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Supreme Court of the United States

OCTOBER TERM, 1969

No. 1251

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL., PETITIONERS

vs.

REDERIAKTIEBOLAGET TRANSATLANTIC

VOLUME I

Petition for Certiorari Filed February 27, 1970
Certiorari Granted April 20, 1970

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

D.C. Form No. 106 Rev. C.A. 65-640-W

Title of Case.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION,
MASSACHUSETTS PORT AUTHORITY,
THE MYSTIC TERMINAL COMPANY,
PORT TERMINALS, INC.
WIGGIN TERMINALS, INC.,
THE NEW YORK CENTRAL RAILROAD COMPANY

Attorneys.

For plaintiffs except Mass. Port Authority
JOHN M. REED
WITHINGTON, CROSS, PARK & MCCANN
73 Tremont St., Boston

THOMAS J. HANNON
141 Milk St., Boston
Mass. Port Authority

v.

THE BOSTON SHIPPING ASSOCIATION, INC.,
AMERICAN EXPORT LINES, INC.,
AMERICAN PRESIDENT LINES, LTD.,
BOSTON SHIPPING CORP.,
FARRELL LINES, INC.,
FURNESS, WITHY & CO., LTD.,
MOORE-McCORMACK LINES, INC.,
J. F. MORAN CO.,
MORAN SHIPPING AGENCIES, INC.,
NORTON, LILLY & COMPANY, INC.,
C. CAMPBELL PATTERSON, JR. and JOHN I. WYLDE,
d/b/a PATTERSON, WYLDE & COMPANY,
PEABODY & LANE, INC.,
C. H. SPRAGUE & SON CO.,
UNITED STATES LINES COMPANY

Attorney.

For defendants
LEO F. GLYNN
50 State St., Boston, Mass.

Statistical Record	**Costs**
J. S. 5 mailed	Clerk
J. S. 6 mailed	Marshal
Basis of Action: Contract—Declaratory Judgment	Docket fee
	Witness fees
Action arose at:	Depositions

Date	**Name or Receipt No.**	**Rec.**	**Disb.**
	(Illegible)		

C.A. 65-540-W

Date		**Proceedings**	**Date Order or Judgment Noted**
1965			
Sep	1	Defts' Petition for Removal filed.	
	1	Attested copies of the following pleadings filed in the Suffolk Superior Court filed; Petition for Declaratory Judgment, Appearance of Leo F. Glynn for defendants, Docket Entries.	
	1	Removal Bond filed, Fidelity and Deposit Co of Maryland, surety $500.00	
	7	Defendants' Answer to Petition for Declaratory Judgment filed. c/s	

9 Pltfs' Notice of Taking Deposition of the deft. The Boston Shipping Assoc Inc by its Mgr. John S. Dennehy on Sept. 17, 1965 at 10 a.m. at 73 Tremont St., Boston, Mass. filed. c/s Subpoena issued.

17 Deft's Notice of Taking Deposition of Sherman L. Whipple on Sept 24, 1965 at 2PM at 50 State St., Boston, Mass. filed. c/s

17 Defts' Notice of Taking Deposition of John F. O'Halloran on Sep 24, 1965 at 3:30PM at 50 State St., Boston, Mass. filed. c/s

Dec 10 Plaintiff's Motion for Pre-Trial Order or, in the Alternative, Summary Judgment filed. c/s Affidavit of Sherman L. Whipple in Support of Motion, and Deposition of John S. Dennehy attached thereto.

30 Pltfs' Brief in Support of Motion for Pre-Trial Order etc filed.

1966

Jan 13 Defendants' Motion for Summary Judgment filed. c/s

24 Defts' Memorandum of Law in Support of its Motion for Summary Judgment filed.

24 Pltfs' Reply Brief filed.

28 WYZANSKI, CH J. Defts' reply memorandum filed;
PRETRIAL BEGINS; parties heard on question of jurisdiction; one week for briefs.

Feb 4 Defts' Memorandum Concerning Jurisdiction of the United States District Court filed. c/s

4 Pltfs' Brief on Jurisdiction filed. c/s

8 WYZANSKI, CH J. Hearing on motion for Pretrial Order; parties stipulate facts and also to prepare order for signature providing for

stay until defendants have opportunity to apply to Federal Maritime Commission. File stipulation soon as possible.

Mar 11 WYZANSKI, CH Jr. Agreed Statement of Facts filed and approved.

11 WYZANSKI, CH Jr. ORDER entered.

"... 1. The Federal Maritime Commission has initial and primary jurisdiction to determine the lawfulness and reasonableness of the practices under Item 11 of Section III of the pltfs' tariff.

2. The within proceeding in this Court is stayed in its present posture to allow the defendants a further opportunity to apply for and obtain from the Commission its determination or rulings as to such lawfulness and reasonableness.

3. The parties shall within 60 days report to the Court upon any action taken pursuant to paragraph 2. The Court may then make an order further staying the within proceeding or such further order as may be appropriate.

4. The Court will retain jurisdiction of the within proceeding. Any question as to whether further proceedings of the cause herein shall be controlled by the Administrative Procedure Act is now reserved."

May 12 Report of Parties pursuant to Court's Order of March 11, 1966, filed.

13 WYZANSKI, CH Jr. Report of Parties noted.

1967

July 27 Amendment to Order filed. Assented to.

Aug 15 WYZANSKI, CH J. Amendment to Order Allowed.

1968

June 14 Plaintiffs' request for admission of facts and genuineness of documents, filed. c/s

June 24 Defendants' answers to plaintiffs notice to admit facts, filed. c/s

July 8 Defendants' request for admission of facts and genuineness of documents, filed. c/s

18 Plaintiffs' Response to Defendants' Request for Admission, filed with c/s.

(Last entry for July 18, 1969)

1969

Apr 15 Motion of Rederiaktiebolaget Transatlantic to intervene as of right under rule 24(a)(2) F.R.C.P. or in the alternative permissively under Rule 24(b)(2) F.R.C.P. filed c/s

16 WYZANSKI, Ch. J. Motion of Rederiaktiebolaget to intervene, allowed. Messrs. Reed, Glynn, Moulton, and Lynch notified.

22 Answer of defendant Intervener Rederiaktiebolaget Transatlantic, filed.

24 Memorandum of Port of Boston Marine Terminal Association for pre-trial conference, filed.

25 WYZANSKI, Ch. J. Stipulation entered into by all parties except Intervener Rederiaktiebolaget filed in open court. Mr. Moulton moves for admission of George J. Galland and Messrs. Galland, Kharasch, Calkins and Lippman for participation in this case; granted. Intervene (sic) informs court that evidence will be offered on its behalf, trial on the merits Monday, April 28, 1969.

28 WYZANSKI, Ch. J. Trial on the merits, jury begins; stipulation of facts by all parties filed in open court; intervener Swedish Transatlantic files two memos,

1) on issues under section 15 of the Shipping Act, and 2) on the status of terminal and carrier tariffs; all evidence concluded; argument reserved.

29 WYZANSKI, Ch. J. Opinion filed. Copy to Messrs. Muldoon, Moulton "... there is no merit to the intervenor's various contentions ... Plaintiff shall prepare an appropriate form for declaratory judgment and order, and serve on all parties by May 5, 1969."

May 2 WYZANSKI, Ch. J. Declaratory judgment and order entered.

"1. That item II of Section III of the plaintiffs' tariff annexed to the petition herein is valid and enforceable, etc. ...

2. defendants listed ... ordered to pay the corresponding plaintiff ..." Copy to Messrs. Muldoon, Stewart, Glynn, Moulton.

21 Deft—Intervenor's notice of appeal filed. Copies to Messrs. Reed, Stewart and Glynn.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Case No. 7368

PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL.,

v.

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,

REDERIAKTIEBOLAGET TRANSATLANTIC

Date	Filings—Proceedings.	Filed
1969		
June 30	Record on appeal in two volumes filed and case docketed. Appearances of Stephen Moulton and George F. Galland, for the appellant, filed.	

July 15	Appearance of John M. Reed and Robert J. Muldoon, Jr., for the appellees filed. Statement and designation filed late by leave of court.
July 22	Counter-designation of appellees filed.
Aug. 11	Brief for appellant filed. Appendix to briefs filed.
Sept. 10	Brief for appellee filed.
Sept. 16	Motion, assented to, filed. Order (Aldrich, Ch. J.) enlarging the time for filing reply brief for appellant to and including September 29, 1969. Notices mailed.
Sept. 25	Assigned for hearing at the October, 1969 session.
Sept. 29	Reply brief for appellant filed.
Oct. 8	Heard before Aldrich, Woodbury, and McEntee, JJ.
Oct. 9	Supplemental memorandum *re* jurisdiction filed.
1970	
Jan. 8	Judgment: The judgment of the District Court is vacated and the case is remanded with directions to enter judgment for the intervening defendant. Costs on appeal in favor of appellant and against Port of Boston Marine Terminal Association et al., appellees. Opinion by Aldrich, Ch.J. Notices mailed.
Jan. 16	Verified bill of costs filed.
Jan. 22	Order (McEntee, J.) staying mandate. Notices mailed.
Jan. 26	Certified copy of appendices and proceedings to Supreme Court. Notices mailed.
Mar. 2	Notice of filing petition for certiorari (2/27/70) filed. [Oct. Term 1969, No. 1251.]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: SUPERIOR COURT
EQUITY
No. 84375

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, an association authorized under the Shipping Act, 1916 (46 U.S.C. sec. 801 et seq.) having a usual place of business in the City of Boston, County of Suffolk;

MASSACHUSETTS PORT AUTHORITY, a body corporate and politic formed under St. 1956, c. 756 (as amended) having a usual place of business in said Boston;

THE MYSTIC TERMINAL COMPANY, a business corporation organized under the laws of Massachusetts, having a usual place of business in the City of Cambridge, County of Middlesex;

PORT TERMINALS, INC., a business corporation organized under the laws of Massachusetts having a usual place of business in said Boston;

WIGGIN TERMINALS, INC., a business corporation organized under the laws of Massachusetts having a usual place of business in said Boston; and

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation organized under the laws of Delaware having a usual place of business in said Boston,

Plaintiffs,

V

THE BOSTON SHIPPING ASSOCIATION, INC., a membership corporation organized under c. 180 of the General Laws having a usual place of business in said Boston;

AMERICAN EXPORT LINES, INC., a corporation organized under the laws of New York, having a usual place of business in said Boston;

AMERICAN PRESIDENT LINES, LTD., a corporation organized under the laws of Delaware having a usual place of business in said Boston;

BOSTON SHIPPING CORP., a business corporation organized under the laws of Massachusetts having a usual place of business in said Boston;

FARRELL LINES INC., a business corporation organized under the laws of New York, having a usual place of business in Boston;

FURNESS, WITHY & CO. LTD., a corporation organized under the laws of Great Britain and Ireland having a usual place of business in said Boston;

MOORE-McCORMACK LINES, INC., a corporation organized under the laws of Delaware, having a usual place of business in said Boston;

J. F. MORAN CO., a corporation organized under the laws of Rhode Island, having a usual place of business in said Boston;

MORAN SHIPPING AGENCIES, INC., a corporation organized under the laws of Massachusetts, having a usual place of business in said Boston;

NORTON, LILLY & COMPANY, INC., a corporation organized under the laws of New York; having a usual place of business in said Boston;

C. CAMPBELL PATTERSON, JR. and JOHN I. WYLDE, partners, doing business as PATTERSON, WYLDE & COMPANY, a partnership organized under the laws of Massachusetts, having a usual place of business in said Boston;

PEABODY & LANE, INC., a business corporation organized under the laws of Massachusetts, having a usual place of business in said Boston;

C. H. SPRAGUE & SON CO., a corporation organized under the laws of Delaware, having a usual place of business in said Boston; and

UNITED STATES LINES COMPANY, a corporation organized under the laws of New Jersey, having a usual place of business in said Boston,

Defendants.

PETITION FOR DECLARATORY JUDGMENT

1. This is a petition under G.L. c. 231A for a declaration of rights with respect to strike storage provisions in a tariff issued by and in behalf of the plaintiffs and for certain other reliefs.

2. The plaintiff Port of Boston Marine Terminal Association ("PBMTA") is an association existing pursuant to Federal Maritime Commission Agreement No. 8785, having a usual place of business in Boston, Suffolk County. A copy of the agreement is annexed as Exhibit A to this bill and is incorporated by reference. [Exhibit A is reproduced in Appendix, vol. II, at p. 5.] The plaintiffs other than PBMTA constitute the present membership of PBMTA. Their organizations and places of business are as stated above.

3. The defendant Boston Shipping Association, Inc. ("BSA") is a Massachusetts non-profit corporation formed for the purpose of promoting harmonious relations between shipowners, shipping agents, brokers, freight forwarders, and other firms and corporations engaged in the maritime industry in Boston and serving its members in the negotiation and carrying out of labor agreements be-

tween the members and their employees. The defendants other than BSA are members of BSA. Their organizations and places of business are as stated above.

4. The members of PBMTA furnish wharfage, dock and other marine terminal facilities in the Port of Boston in connection with common carriers by water in interstate and foreign commerce.

5. Pursuant to Agreement No. 8785, PBMTA originally issued Terminal Tariff No. 1 on June 15, 1962. The tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785. A copy of the tariff as presently in force is annexed as Exhibit B and is incorporated by reference. [Exhibit B is reproduced in Appendix, vol. II, at p. 11.]

6. A controversy has arisen between the parties concerning the validity and effect of the provisions of the tariff concerning strike storage, namely, item 11 of Section III, appearing at page 20 of Exhibit B. BSA takes the position that the strike storage provisions are not controlling and its members who are steamship owners and agents accordingly refuse to pay strike storage on the terms contained in the tariff. PBMTA and its members, having issued the tariff, including item 11, under Agreement No. 8785, take the position that item 11 is binding on all users of the respective terminals.

7. The Port of Boston was closed down from January 11, 1965 to February 13, 1965 by a longshoremen's strike. The longshoremen were and are employees of the defendants and not of the plaintiffs. During the strike, strike storage charges were accrued against the defendants other than BSA in the amounts shown in Exhibit C attached to this bill and incorporated herein by reference. [Exhibit C is reproduced in Appendix, vol. II, at p. 48.] The amount of the charges is not in controversy, but the respective defendants refuse to pay any part of such charges.

8. The controversy presented by this bill for decision gives rise to uncertainty and confusion among the parties as to their rights and is properly a subject for declaratory relief.

WHEREFORE, the plaintiffs pray:

(1) That, upon due notice, the pleadings be speedily completed;

(2) That the Court enter a declaratory decree adjudging that, under item 11 of Section III of the plaintiffs' tariff, the defendants are obligated to pay strike charges as they accrue;

(3) That the Court order the defendants to pay such amounts to the respective plaintiffs as may be found to be owing for strike storage; and

(4) For such other relief as may be proper.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION,
THE MYSTIC TERMINAL COMPANY,
PORT TERMINALS, INC.
WIGGIN TERMINALS, INC., and
THE NEW YORK CENTRAL RAILROAD COMPANY,
By their attorney,
JOHN M. REED

MASSACHUSETTS PORT AUTHORITY,
By its attorney,
THOMAS J. HANNON

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

PETITION FOR REMOVAL

RESPECTFULLY represents the defendants in the above-entitled action, which is a civil action, in equity, com-

menced in the Superior Court, Suffolk County, Boston, Massachusetts.

That the action is one in which a claim is alleged under the Laws of the United States, within the provisions of Section 1441 (b) of Chapter 89, Title 28, United States Code Annotated, the venue and procedure concerning which is within the original jurisdiction of the District Courts of the United States.

The above-entitled action was instituted in the Suffolk Superior Court, Commonwealth of Massachusetts, and a copy of the Petition for Declaratory Judgment was received by counsel for the defendants on August 19, 1965. A copy of the Petition for Declaratory Judgment is hereto attached and made part hereof. [*Supra,* p. 9.]

And your petitioner offers and files herewith a Bond with a good and sufficient surety for its entry in the District Court of the United States for the District of Massachusetts within thirty (30) days from the date of filing of this petition, and a certified copy of the record in this action, and for the payment of all costs that may be awarded by the said District Court of the United States, if the said District Court of the United States should hold that this action is wrongly removed thereto.

And your petitioner prays, therefore, that said surety and bond may be accepted and that said action may be removed to the District Court of the United States to be held in the District of Massachusetts at Boston pursuant to the Statutes of the United States in such causes made and provided, and that no further proceedings may be had herein in the said Suffolk Superior Court.

By their attorney,
/s/ Leo F. Glynn
Leo F. Glynn
50 State Street
Boston, Massachusetts

Then personally appeared the above-named Leo F. Glynn and made oath that he is attorney for the multiple defendants in the foregoing petition, that he has read the said petition and knows the contents thereof, that the same is true to the best of his knowledge, information and belief, that the said petition is signed by the attorney for the defendants who agrees that it will be given the same weight as if signed by an officer of the defendants individually.

Subscribed and sworn to before this first day of September, 1965.

/s/ JOHN T. RILEY
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS
(Title omitted in printing)

DEFENDANTS' ANSWER TO PETITION FOR DECLARATORY JUDGMENT

Now come the defendants in the above-entitled action, by their attorney, Leo F. Glynn, and make the following answer to the plaintiffs' Petition for Declaratory Judgment:

First: The defendants respectfully submit that the first paragraph of the plaintiffs' petition is a declaration of purpose and as such is not required to be admitted or denied.

Second: The defendants are without knowledge concerning the allegations in the second paragraph of the plaintiffs' petition and, therefore, deny the same.

Third: The defendants admit the allegations in the third paragraph of the plaintiffs' petition.

Fourth: The defendants are without knowledge and, therefore, deny the allegations in the fourth paragraph of

the plaintiffs' petition, except that the defendants admit the use of wharfs of the plaintiff by ocean vessels.

Fifth: The defendants deny the allegations in the fifth paragraph of the plaintiffs' petition and specifically that the tariff rates were legally or properly in force.

Sixth: The defendants admit that a controversy has arisen between the parties, but denies that it is limited to the allegations cited in paragraph six of the plaintiffs' petition.

Seventh: The defendants deny the allegations in the seventh paragraph of the plaintiffs' petition.

Eighth: The defendants deny the allegations in the eighth paragraph of the plaintiff's petition, except as to the allegations previously admitted in paragraph sixth herein.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that prior to the dates of the alleged storage, the defendants notified the plaintiffs, in accordance with the telegram annexed hereto [*infra*], of their refusal to accept the terms of the proposed charges and have continued to reaffirm that refusal on numerous other occasions, as will be shown more fully at the time of trial.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that the allegations contained in the petition do not set forth a cause of action within the provisions of the Shipping Act.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that the provisions of the Shipping Act, Title 46 801 *et seq.*, do not provide to the plaintiffs any remedy by operation of law.

AND FURTHER ANSWERING, and as a complete and separate defense, the defendants say that the plaintiffs

have failed to comply with the provisions of the Shipping Act aforesaid.

WHEREFORE, the defendants pray that the petition be dismissed with costs.

By their attorney,
/s/ Leo F. Glynn
50 State Street
Boston, Massachusetts

[Certificate of Service]

EXHIBIT

Sherman L. Whipple, Chairman, Port of Boston Marine Terminal Assn.
50 Terminal Street
Boston, Massachusetts 1964 Sept 29 PM 4:26

Reference is made to Paragraph E of Item 4, First Revised Page 18, cancelling original page 18 of a tariff issued by Sherman L. Whipple, Chairman, 50 Terminal Street, Boston, Massachusetts, purportedly to be effective September 30, 1964.

This is to notify the aforesaid Sherman L. Whipple in his capacity as issuing agent that no member of the Boston Shipping Association accepts in any respect whatsoever the terms described in Paragraph E, nor will any member of the Boston Shipping Association agree in any respect to accept the assessment on the vessel with respect to wharf demurrage referred to therein. The members of the Boston Shipping Association herewith expressly refuse to accept or be bound in any respect by the aforesaid clause in any transaction which may occur.

Boston Shipping Association, Inc.
John S. Dennehy, Manager

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

PLAINTIFFS' MOTION FOR PRE-TRIAL ORDER OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

Plaintiffs move that the Court, in its discretion, enter either an order pursuant to Rule 16 for the simplification of issues and other matters which may aid in the disposition of the pending action or, in the alternative, a summary judgment pursuant to Rule 56 upon prayer 2 of the petition in this case. Plaintiffs propose that the terms of such order or judgment be as follows:

"Defendants may proceed before the Federal Maritime Commission by complaint or otherwise to secure review as to the reasonableness of item 11 of Section III of plaintiffs' tariff. Unless defendants have so proceeded and obtained such review prior to the trial of this cause, item 11 of Section III will be considered valid for the purpose of this litigation."

Plaintiffs submit the following documents in support of this motion: an affidavit of Sherman L. Whipple, Chairman of plaintiff Port of Boston Marine Terminal Association; and a deposition of John S. Dennehy, Manager of de-

fendant Boston Shipping Association, Inc., together with accompanying exhibits.

By their attorneys,

/s/ Thomas J. Hannon
THOMAS J. HANNON
Attorney for Massachusetts Port Authority

/s/ John M. Reed
JOHN M. REED
Withington, Cross, Park & McCann
Attorneys for all plaintiffs other than Massachusetts Port Authority

[Certificate of Service]

AFFIDAVIT OF SHERMAN L. WHIPPLE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRE-TRIAL ORDER OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

The undersigned, Sherman L. Whipple, being duly sworn, deposes and says that:

1. He is chairman of the Port of Boston Marine Terminal Association ("PBMTA") and as such chairman gives this affidavit.

2. PBMTA was formed under an agreement dated February 26, 1962, a copy of which is annexed to this affidavit and marked "A." [Exhibit "A" is reproduced in Appendix, vol. II, at p. 5.] On March 16, 1962 the Federal Maritime Commission published in the Federal Register (at page 2539) a notice that agreement No. 8785 had been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916. The Commission sub-

sequently gave its approval, and copy of the approval is annexed hereto and marked "B."

3. PBMTA has had in force since 1962 a published tariff known as F.M.C. Terminal Tariff No. 1. From time to time pages of the tariff have been revised. When this is done a new page is stapled directly over the old page and the old page is marked cancelled. A copy of the tariff as it was in force during the longshoremen's strike in 1965 is annexed hereto, with the cancelled pages included as cancelled, and marked "C." [Exhibit "C" is reproduced in Appendix, vol. II, at p. 11.]

4. On August 5, 1964, the Superintendent of Marine Terminals of the Massachusetts Port Authority, which is one of the member terminal operators, wrote the undersigned a letter, copy of which is annexed and marked "D." There has been subsequent correspondence between PBMTA and the Boston Shipping Association. Exhibits representing this correspondence are attached to the deposition of John S. Dennehy, manager of the Boston Shipping Association. The undersigned is personally familiar with this correspondence.

5. The Commission has undertaken an investigation of free time and demurrage practices on in-bound cargo in the Port of New York. Copy of the notice of this investigation was published in the Federal Register on May 12, 1965. Both PBMTA and the Massachusetts Port Authority have intervened in that proceeding as parties. Copy of the petition for intervention of PBMTA is annexed hereto as Exhibit "E." [Exhibit "E" is not reproduced in the Appendix.] PBMTA has been allowed to intervene by the Commission.

/s/ Sherman L. Whipple
Sherman L. Whipple

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

On this 9th day of December, 1965 personally appeared before me Sherman L. Whipple, chairman of the Port of Boston Marine Terminal Association, and made oath that the foregoing affidavit, by him subscribed, is true, of his own knowledge.

ELEANOR G. NOONAN
Notary Public

EXHIBIT B

FEDERAL MARITIME COMMISSION
WASHINGTON 25, D.C.

In reply refer to:
A17-9-1/8785:40

May 10, 1962

Mr. Sherman L. Whipple
Port of Boston Marine
Terminal Association
50 Terminal Street
Boston 29, Massachusetts

Dear Mr. Whipple:

You are hereby notified that by order of May 7, 1962, the Federal Maritime Commission, pursuant to section 15 of the Shipping Act, 1916, approved Agreement No. 8785, copy of which is enclosed.

Sincerely yours,
/s/ THOMAS LISI
Thomas Lisi
Secretary

EXHIBIT D

MASSACHUSETTS PORT AUTHORITY

Operating: The Mystic River Bridge - Port of Boston Facilities - Boston-Logan International Airport - Hanscom Field

141 MILK STREET - BOSTON - 9
MASSACHUSETTS - TELEPHONE 482-2930

August 5, 1964

Port of Boston Marine Terminal Association
50 Terminal Street
Boston 29, Massachusetts
Att: Sherman L. Whipple, Chairman

Dear Mr. Whipple:

In reply to your request for additional subjects to be discussed at the August 12th meeting of the Port of Boston Marine Terminal Association may I suggest the following.

Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

I am of the opinion we should establish a more compatible understanding with customers of Boston and assess a charge against the vessel. Consignees, in most instances, are desirous of taking custody of their cargo as quickly as possible and we all know the turmoil that exists on the piers if a "strike is imminent". I am not suggesting we waive the charges, as then the Boston terminal operators would possibly look to the Authority for an abatement or adjustment in rent during the period, however if the steamship

company is unable to deliver the merchandise then I believe it is a charge for their account, not for the consignee or shipper.

• • • • •

Very truly yours,
MASSACHUSETTS PORT AUTHORITY
/s/ J. CONNOLLY
J. J. Connolly
Supt. of Terminals

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL
vs.
BOSTON SHIPPING ASSOCIATION, INC, ET AL

CIVIL ACTION
No. 65-640-W

ORDER

The Court, upon considering the respective motions filed by the parties and the Statement of Agreed Facts, makes the following order:

1. The Federal Maritime Commission has initial and primary jurisdiction to determine the lawfulness and reasonableness of the practices under Item 11 of Section III of the plaintiffs' tariff.

2. The within proceeding in this Court is stayed in its present posture to allow the defendants a further opportunity to apply for and obtain from the Commission its de-

termination or ruling as to such lawfulness and reasonableness.

3. The parties shall within 60 days report to the Court upon any action taken pursuant to paragraph 2. The Court may then make an order further staying the within proceeding or such further order as may be appropriate.

4. The Court will retain jurisdiction of the within proceeding. Any question as to whether further proceedings of the cause herein should be controlled by the Administrative Procedure Act is now reserved.

/s/ C. E. Wyzanski, Jr., C. J.

Entered: March 11, 1966

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

REPORT OF PARTIES

The parties report to the Court that, following the Court's order, the following steps have been taken: The defendants in the within proceeding filed a complaint (Docket 66-28) with the Federal Maritime Commission on or about April 21, 1966 challenging the lawfulness, and reasonableness of the charges in question herein. The plaintiffs herein subsequently filed an answer as respondents. On May 10, 1966 the presiding examiner of the Commission set a pre-hearing on the matter to be held on May 18, 1966.

In the opinion of counsel, no further order is necessary at the present time in this proceeding.

WITHINGTON, CROSS, PARK & GRODEN

/s/ John M. Reed

GLYNN & DEMPSEY

/s/ Leo F. Glynn

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

AMENDMENT TO ORDER

Now come the respondents in the above-entitled action and respectfully request that the Order of Judge C. E. Wyzanski, Jr., entered March 11, 1966, be amended by adding the following paragraph:

"5. All normal rights of appeal from any decision of the Federal Maritime Commission are reserved to the parties under the applicable statutes and decisions."

15 Aug. 67
Allowed
Wyzanski C. J.

By their attorney,
/s/ Leo F. Glynn
Leo F. Glynn
50 State Street
Boston, Massachusetts

July 25, 1967
Assented to:
Withington, Cross, Park & Groden
by Lothrop Withington

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

MOTION OF REDERIAKTIEBOLAGET TRANSATLANTIC TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2), F.R.C.P. OR IN THE ALTERNATIVE PERMISSIVELY UNDER RULE 24(b)(2), F.R.C.P.

Rederiaktiebolaget Transatlantic (hereafter Transatlantic) respectfully moves to intervene in the above-designated action (a) as of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, or (b) in the alternative, permissively under Rule 24(b)(2), Federal Rules of Civil Procedure. In support of this motion, Transatlantic states:

1. Transatlantic is a common carrier by water operating a steamship business in the foreign commerce of the United States. At all times relevant to the issues involved in this case, Transatlantic was represented at the Port of Boston by its agent, Furness, Withy & Co., Ltd.

2. The complaint filed herein names 14 defendants, five of whom (like Transatlantic) are steamship companies; eight of whom, including Furness, Withy, are agents representing one or more steamship companies; and the remaining defendant is a shipping association whose membership comprises both steamship companies and agents of steamship companies. The complaint requests money damages in specified amounts against each steamship company or agent, as set forth in Exhibit C of the complaint.

3. Plaintiff's request for admission of facts and genuineness of documents filed in this Court on June 14, 1968 shows that plaintiff's total claim is in the amount of $33,309.27 ($34,726.93 minus $1,417.68 reported as paid), and this claim is comprised of 15 separately-stated claims

against 12 defendants. The largest amount outstanding is a claim of $9,965.01 against Furness, Withy, of which $1,200.00 has been paid since June 14, 1968.

4. Transatlantic believes that a substantial portion of claims other than the claim against Furness, Withy has been paid, leaving the claim against Furness, Withy of $8,765.01 the largest single claim. Transatlantic is unable to determine which claims have been paid and which are outstanding because defendants' counsel has been unable thus far to supply that information.

5. If judgment is entered against Furness, Withy, Transatlantic will be liable to reimburse Furness, Withy as its agent in the amount of $8,154.85.

6. Following the filing of plaintiffs' complaint and defendant's answer thereto, both plaintiffs and defendants moved for summary judgment. This Court, on March 11, 1966, stayed the proceeding, retaining jurisdiction thereof, in order to allow the defendants to obtain rulings from the Federal Maritime Commission as to issues which this Court held were within the initial and primary jurisdiction of that Commission. The present defendants made application to the Commission, which rendered a ruling adverse to the defendants on June 28, 1967. No petition to review the Commission's ruling was seasonably filed with any Court of Appeals.

7. On September 4, 1968, Transatlantic, which at all times prior thereto had been represented by counsel for Furness, Withy, petitioned the Federal Maritime Commission in its own name and by its own counsel to reconsider its ruling on the basis of a decision by the Supreme Court of the United States rendered after the Commission's ruling. Transatlantic urged before the Commission that the Supreme Court holding rendered erroneous the aforesaid Commission ruling which this Court had allowed the defendants to procure. The Commission refused to accept

for filing the Transatlantic petition on the ground that the Commission's rules absolutely prohibit the filing of any petitions for reconsideration more than 30 days after the date of a Commission action.

8. Transatlantic has an interest relating to the property which is the subject of this action because it will be obliged to indemnify Furness, Withy as its agent for Transatlantic's pro rata share of any judgment against Furness, Withy. Transatlantic is so situated that a judgment against Furness, Withy will impede Transatlantic's ability to protect its own interest because such judgment against Furness, Withy will be binding on Transatlantic, and Transatlantic will thereafter be unable to contest the plaintiffs' claims even though Transatlantic is advised and believes that it has a meritorious defense.

9. Transatlantic's interest is not adequately represented by existing parties because—

(a) Furness, Withy is the only party having any measure of responsibility for Transatlantic's interest;

(b) Such responsibility is slight because:

(1) Furness, Withy is agent for four other principals in addition to Transatlantic. Three of such principals have already paid the claim against them. Such payments amount to $1,200. Of the remaining $8,765.01 assertedly due from Furness, Withy, $8,154.85 is owed by Transatlantic;

(2) The liability for Transatlantic's pro rata share of plaintiffs' demands falls ultimately on Transatlantic and not at all on Furness, Withy, which consequently lacks substantial incentive to contest such demands.

(c) No other defendant, and no other principal of Furness, Withy is subject to a claim more than fractionally as large as that against Transatlantic.

(d) Neither Furness, Withy nor any other defendant perfected an appeal to any court of competent jurisdiction from the ruling of the FMC or tendered in this court the issues which Transatlantic now seeks to raise.

10. Accordingly, Transatlantic moves to intervene as of right under Rule 24(a)(2). In the alternative, Transatlantic moves to intervene permissively under Rule 24(b)(2) on the ground that its defense to the complaint involves questions of law and fact which are common to the main action in this case and that its intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

/s/ STEPHEN MOULTON

STEPHEN MOULTON
Moulton, Looney, Mazzone & Falk
15 Broad Street
Boston, Massachusetts 02109
Attorney for
Rederiaktiebolaget Transatlantic

Of Counsel:
Galland, Kharasch,
Calkins & Lippman
1824 R Street, N.W.
Washington, D.C. 20009

April 8, 1969
[Certificate of Service]

Allowed
Wyzanski, C. J.
16 April '69

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

ANSWER OF DEFENDANT-INTERVENER REDERIAKTIEBOLAGET TRANSATLANTIC

Defendant-Intervener Rederiaktiebolaget Transatlantic (hereafter, Transatlantic), answering the Petition for Declaratory Judgment:

1. Admits paragraph 1 except denies that the document therein described as a tariff in fact constituted a tariff or had any force or effect as such.

2. Admits paragraph 2.

3. States that it has no information sufficient to form a belief as to paragraph 3.

4. Admits paragraph 4 but denies that the members of PBMTA are legally authorized to perform terminal services except as permitted under Article THIRD of Federal Maritime Commission Agreement 8785.

5. Admits paragraph 5 except denies that the document therein described as a tariff in fact constituted a tariff or had any force or effect as such.

6. Admits the first sentence of paragraph 6 except denies that the document therein described as a tariff in fact constituted a tariff or had any force or effect as such; states that it lacks information sufficient to admit or deny the remaining allegations of the paragraph; and alleges that the purported tariff was not binding on Transatlantic.

7. Admits the first sentence of paragraph 7; denies that the striking longshoremen were employees of Transatlantic; states that it lacks information sufficient to admit or deny the remaining allegations of the paragraph except that—(a) it admits that $8,154.85 of the sum claimed by Mystic Terminal Co. against Furness, Withy & Co. is claimed with respect to cargo discharged from one of Transatlantic's vessels for which Furness, Withy acted as agent; and (b) denies that Transatlantic is liable for the charges claimed or any part thereof.

8. Denies paragraph 8.

For a first affirmative defense, states:

9. That Federal Maritime Commission Agreement 8785 does not authorize plaintiffs to adopt charges for strike storage, or to assess strike storage or any other wharfage charges against vessels or their owners; consequently plaintiffs' agreement to assess such charges, as set forth in their purported tariff, is unlawful under Section 15 of the Shipping Act (46 U.S.C. § 814) because not approved by the Federal Maritime Commission.

10. A ruling of the Federal Maritime Commission of June 28, 1967 in Docket 66-28 was:

(a) wrong when issued because it misinterpreted Section 15 of the Shipping Act, 46 U.S.C. § 814;

(b) advisory only, and not binding on this Court;

(c) in direct conflict with the decision of the Supreme Court of the United States issued on March 6, 1968 in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261.

For a second affirmative defense, states:

11. The purported tariff (Exhibit B to the complaint) on which rests plaintiffs' claim was not in fact a tariff because not filed pursuant to any statute or regulation (a) requiring that tariffs be filed by terminal operators, or (b) providing that such "tariffs" were binding upon users of terminal services. Plaintiffs' purported tariffs were merely reports to the Federal Maritime Commission pursuant to commitments made by the parties to Agreement 8785.

For a third affirmative defense, states:

12. The cargo discharged by Transatlantic at Mystic Terminal was transported under the terms of a tariff filed with the Maritime Commission pursuant to Section 18 (b) (1) of the Shipping Act (46 U.S.C. § 817(b)(1)) and hav-

ing the force of law pursuant to Section 18(b)(3) of th
Shipping Act (46 U.S.C. § 817(b)(3)). That tariff pr
vided that Transatlantic's responsibility terminated upo
discharge of the cargo at the end of ship's tackle. An
payment for service to cargo beyond ship's tackle woul
violate its tariff and consequently Sections 18(b)(3) of th
Shipping Act and also Section 16, Second of the Shippin
Act, 46 U.S.C. § 815.

WHEREFORE, Defendant-Intervener Transatlantic de
mands judgment—

(a) dismissing the complaint as against Tran
atlantic and with respect to all claims pertaining t
cargo discharged by Transatlantic; or, alternatively

(b) determining that neither Transatlantic no
Furness, Withy as its agent is liable for the strike sto
age charges demanded in the complaint, or for an
part of such charges.

/s/ STEPHEN MOULTON
STEPHEN MOULTON
Moulton, Looney, Mazzone & Falk
15 Broad Street
Boston, Massachusetts 02109
Attorney for
Rederiaktiebolaget Transatlantic

Of Counsel:
Galland, Kharasch,
Calkins & Lippman
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Washington, D.C. 20009

[Certificate of Service]

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

STIPULATION OF FACTS

Plaintiffs and defendants stipulate that the following are the material facts:

1. The facts stated in the report of the Federal Maritime Commission under the heading "FACTS" may be taken as true. 10 F.M.C. 409 at 410-413. The facts stated in the report of Examiner Theeman through page 9, middle of the page, may also be taken as true to the extent not inconsistent with the Commission's report. (The parties are unaware of any inconsistency.) Copies of the opinion of the Federal Maritime Commission and the decision of the Examiner are attached hereto as Exhibits "A" and "B". [Exhibit "A" is reproduced in Appendix, vol. II, at p. 48; Exhibit "B" is not reproduced.]

2. The plaintiff, Port of Boston Marine Terminal Association (PBMTA) is an association existing pursuant to Federal Maritime Agreement No. 8785, and has a usual place of business in Boston, Massachusetts. A copy of Agreement No. 8785 is attached hereto as Exhibit "C". [Exhibit "C" is reproduced in Appendix, vol. II, at p. 5.] The plaintiffs other than PBMTA are the present membership of PBMTA. Their organizations and places of business are as stated in the plaintiffs' petition.

3. The defendants are the Boston Shipping Association (BSA), a Massachusetts non-profit corporation, and several members of BSA, whose organizations and places of business are as stated in the plaintiffs' petition.

4. The members of PBMTA furnish wharfage, dock and other marine terminal facilities in the Port of Boston in

connection with common carriers by water in interstate and foreign commerce.

5. Pursuant to Agreement No. 8785, PBMTA issued Terminal Tariff No. 1, on June 15, 1962. The tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785. A copy of the tariff is on file with the court with the affidavit of Sherman L. Whipple.

6. On or about April 21, 1966, after this case had commenced, the defendants filed a complaint with the Federal Maritime Commission challenging the lawfulness and reasonableness of Item 11 of the Tariff.

7. On or about September 19, 1967, defendants filed a petition for review of the Commission's order of June 28, 1967, in the United States Court of Appeals for the District of Columbia Circuit.

8. By a judgment dated March 18, 1968, the Court of Appeals dismissed the petition. A copy of the judgment is attached hereto as Exhibit "D." [Exhibit "D" is reproduced in Appendix, vol. II, at p. 66.]

9. By an order dated April 25, 1968, the Court of Appeals denied defendants' application for rehearing. A copy of that order is annexed as Exhibit "E." [Exhibit "E" is reproduced in Appendix, vol. II, at p. 67.]

10. On September 4, 1968, Swedish Transatlantic Line presented a petition to the Federal Maritime Commission for reconsideration of its decision in this matter. A copy of the Petition for Reconsideration is annexed hereto as Exhibit "F." [Exhibit "F" is reproduced in Appendix, vol. II, at p. 68.]

11. On October 8, 1968, the Federal Maritime Commission returned the Petition for Reconsideration to the attorneys for Swedish Transatlantic Line on the grounds that

it was time barred. A copy of the letter returning the petition is attached hereto as Exhibit "G." [Exhibit "G" is reproduced in Appendix, vol. II, at p. 77.]

12. The current balances of strike storage charges are not in controversy. Those current balances are shown in Exhibit "H" attached hereto.

By their attorneys,

WITHINGTON, CROSS, PARK & GRODEN

By: /s/ JOHN M. REED
/s/ ROBERT J. MULDOON, JR.
Counsel for all petitioners except
Massachusetts Port Authority
/s/ NEIL L. LYNCH
Counsel for petitioner
Massachusetts Port Authority

GLYNN & DEMPSEY

By: /s/ LEO F. GLYNN
Counsel for defendants

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

Plaintiffs, defendants and defendant-intervener stipulate that the following are the material facts:

1. The plaintiff Port of Boston Marine Terminal Association (PBMTA) is an association existing pursuant to Federal Maritime Agreement No. 8785, and has a usual place of business in Boston, Massachusetts. A copy of Agreement No. 8785 is attached hereto as Exhibit I. [Exhibit I is reproduced in Appendix, vol. II, at p. 5.] The plaintiffs other than PBMTA are the present membership of PBMTA. Their organizations and places of business are as stated in the plaintiffs' petition.

2. The defendants are the Boston Shipping Association (BSA), a Massachusetts non-profit corporation, and sev-

eral members of BSA whose organizations and places of business are as stated in the plaintiffs' petition. The defendant-intervener, Transatlantic, is not a member of BSA. It is a Swedish corporation whose headquarters is in Gothenburg.

3. The members of PBMTA furnish wharfage, dock and other marine terminal facilities in the Port of Boston in connection with common carriers by water in interstate and foreign commerce.

4. Pursuant to Agreement No. 8785, PBMTA issued Terminal Tariff No. 1, on June 15, 1962. The tariff was filed with the Federal Maritime Commission in accordance with the requirements of Agreement No. 8785. A copy of the tariff is on file with the court with the affidavit of Sherman L. Whipple.

5. On or about April 21, 1966, after this case had commenced, the defendants filed a complaint with the Federal Maritime Commission (Docket 66-28) challenging the lawfulness and reasonableness of Item 11 of the Tariff. This case was stayed by this court pending action by the Commission—this court retaining jurisdiction. A copy of the Commission's report in Docket 66-28 is annexed hereto as Exhibit J. [Exhibit J is reproduced in Appendix, vol. II, at p. 48.]

6. On or about September 19, 1967, defendants filed a petition for review of the Commission's order of June 28, 1967, in the United States Court of Appeals for the District of Columbia Circuit.

7. By a judgment dated March 18, 1968, the Court of Appeals dismissed the petition. A copy of the judgment is attached hereto as Exhibit K. [Exhibit K is reproduced in Appendix, vol. II, at p. 66.]

8. By an order dated April 25, 1968, the Court of Appeals denied defendants' application for rehearing. A copy of that order is annexed as Exhibit L. [Exhibit L is reproduced in Appendix, vol. II, at p. 67.]

9. On September 4, 1968, Swedish Transatlantic Line presented a petition to the Federal Maritime Commission for reconsideration of its decision in Docket 66-28. A copy of the Petition for Reconsideration is annexed hereto as Exhibit M. [Exhibit M is reproduced in Appendix, vol. II, at p. 68.]

10. On October 8, 1968, the Federal Maritime Commission returned the Petition for Reconsideration to the attorneys for Swedish Transatlantic Line on the grounds set forth in the letter annexed hereto as Exhibit N. [Exhibit N is reproduced in Appendix, vol. II, at p. 77.]

11. The current balances of strike storage charges are not in controversy. Those current balances are shown in Exhibit O attached hereto. [Exhibit O is reproduced in Appendix, vol. II, at p. 77.] Of the sum claimed against Furness, Withy & Co., by Mystic Terminal, $8154.85 is allegedly for account of the intervener, Swedish Transatlantic Line.

12. The charges claimed by Mystic Terminal against Furness, Withy involving Transatlantic arose with respect to cargo discharged at Mystic Terminal on January 8-10, 1965 from Transatlantic's vessel, MATTAWUNGA, which departed the terminal on the latter date.

13. A strike of longshoremen and tally clerks and other clerks closed the port of Boston on January 11, 1965 and continued for 33 days. While the strike continued, truck drivers and railroad workers needed to pick up cargo declined to do so and striking clerks were unavailable to make delivery, thus preventing removal of cargo from all Boston piers.

14. Free time on all cargo here involved was five days, under plaintiffs' terminal tariff. On cargo from the MATTAWUNGA, it began on January 10, 1965.

15. The steamship tariffs applicable to the cargo carried by the MATTAWUNGA and discharged at Mystic Terminal were:

(a) Bill of Lading Tariff No. 1 of Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; and

(b) Tariff No. 4 of the same Conference. Exhibit P [Relevant portions of Exhibit P are reproduced in Appendix, vol. II, at p. 78] hereto annexed is the applicable Transatlantic bill of lading from the tariff designated (a) above, and Exhibit Q [Relevant portions of Exhibit Q are reproduced in Appendix, vol. II, at p. 79] is a copy of 1st Revised Page 1 and Original Page 3 of the tariff designated (b) above. Both tariffs were filed with the Federal Maritime Commission pursuant to Section 18(b) of the Shipping Act, 1916. The Transatlantic bill of lading was in evidence, along with others in Docket 66-28.

16. The striking longshoremen (paragraph 13, above) were employees of various stevedoring companies with whom the ocean carriers involved had contracts for the loading and unloading of freight vessels in the port of Boston. A copy of the contract between Transatlantic and Bay State Stevedoring Co. is annexed as Exhibit R. [Ex-

hibit R is not reproduced.] The tally clerks on strike at Mystic Terminal were employees of Bay State Stevedoring Co.

WITHINGTON, CROSS, PARK & GRODEN
By /s/ JOHN M. REED
/s/ ROBERT J. MULDOON, JR.
Counsel for all petitioners except Massachusetts Port Authority
/s/ NEIL L. LYNCH
Counsel for petitioner Massachusetts Port Authority

GLYNN & DEMPSEY
By /s/ LEO F. GLYNN
Counsel for defendants
By /s/ STEPHEN MOULTON
STEPHEN MOULTON
Counsel for intervener Rederiaktiebolaget Transatlantic

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., ET AL.,
PLAINTIFFS

v.

Civil Action
No. 65-640-W

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS

REDERIAKTIEBOLAGET TRANSATLANTIC,
DEFENDANT-INTERVENER

OPINION

April 29, 1969

WYZANSKI, Chief Judge

This action was originally brought in the Superior Court of the Commonwealth of Massachusetts for declaratory relief and an order for payment, both referring to a provision in plaintiffs' tariff providing storage charges for cargo located in Boston during longshoremen's strike.

Pursuant to 28 U.S.C. Sec. 1441 b, defendants petitioned for removal of the action to this Court on the ground that the "claim" sued upon is one "arising under the . . . laws of the United States."

The complaint, called a petition under state practice, alleges that Port of Boston Marine Terminal Association (PBMTA) is an association existing under Federal Maritime Commission Agreement No. 8785, that the members furnish wharfage, dock, and other terminal facilities in connection with common carriers by water, and that the applicable tariff is filed with the Maritime Commission. The tariff is said to have been adopted under Section 15 of the Shipping Act, 1916. Relief sought was (1) a declaration that under item 15 of Section III of the tariff, Boston Shipping Association and other defendants are obliged to pay strike charges as they accrue, and (2) an order for payment of charges already accrued during a 1965 dock strike.

At an early stage this Court held that the case is one within this Court's jurisdiction under 28 U.S.C. Sec. 1441 b. See *Wells Fargo & Co. v. Cuneo,* 241 Fed. 726 (S.D.N.Y.); *McGoon v. Northern Pacific Ry. Co.,* 204 Fed. 998 (D.N.D.); Hart & Wechsler, *The Federal Courts and the Federal System,* pp. 727-733, 744-747, 749-752, 763-769, 774-777. Plaintiffs' claim, in this Court's view, involves the construction of the Shipping Act and the result depends on the determination of a controversy as to its scope. Cf. *Shulthis v. McDougal,* 225 U.S. 561, 569. The claim

arises under Agreement No. 8785, which was approved by a federal government agency, the Federal Maritime Commission, and requires consideration of that Commission's rulings. The claim involves, potentially at least, the primary jurisdiction of the Commission. Thus the right of the complainants will be sustained if the laws of the United States and the rules and actions of a federal agency are given one construction and will be defeated if they are given another. See *Bell v. Hood,* 327 U.S. 678.

Having determined it had jurisdiction of this case, this Court on March 11, 1966 entered an order that the Federal Maritime Commission had primary jurisdiction to determine the lawfulness and reasonableness of the contested practice under item 11 of Section III; and that proceedings in this Court should be stayed pending administrative action.

April 21, 1966 defendant presented to the Federal Maritime Commission a challenge to the lawfulness and reasonableness of the questioned charges. After hearing by an examiner, the Commission issued its final report and order under the title *Boston Shipping Association Inc. v. Port of Boston,* 10 F.M.C. 409 (1967). Therein the F.M.C. held that assessment of strike storage charges for cargo on the Boston piers during longshoremen's strikes is subject to the Commission's jurisdiction under Section 17 of the Shipping Act, 1916; that a change in the tariff, shifting the charge from the cargo interests to the vessel did not require prior approval by the Commission under Section 15 of the Act; and that the assessment of the charge against the vessel for cargo which was still in free time (that is, five days following discharge from the vessel) at the commencement of the strike does not constitute an unjust and unreasonable practice under Section 17 of the Act or an undue or unreasonable prejudice under Section 16 of the Act.

No timely appeal was taken from the Commission's order to the Court of Appeals for the District of Columbia.

Swedish Transatlantic Line, which has intervened in this court, on September 4, 1968 filed with the F.M.C. a petition for reconsideration. The F.M.C. dismissed. Swedish Transatlantic sought no review in the District of Columbia.

Thereafter, in this court plaintiffs and defendants entered into one stipulation, and plaintiffs, defendants, and the intervenor entered into another. This Court approved both stipulations. No one wished to offer additional evidence.

On the basis of the stipulations, and in the light of what has been recited, this Court summarily concludes as follows.

The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.

Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

There is no merit to the intervenor's various contentions. It will suffice to deal with one, in addition to those already answered. The F.M.C.'s report cannot be regarded as merely advisory. It was a definite decision. And it was a correct one. There is nothing to be gained by this

Court traversing once more the ground so satisfactorily covered by the Commission itself, and open to inspection by anyone who cares to read the publications of the Commission.

Plaintiffs shall prepare an appropriate form for declaratory judgment and order, and shall serve on all parties by May 5, 1969.

/s/ Charles E. Wyzanski, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC. ET AL.,
PLAINTIFFS

v.

Civil Action
No. 65-640-W

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS

REDERIAKTIEBOLAGET TRANSATLANTIC
DEFENDANT-INTERVENER

[Filed

DECLARATORY JUDGMENT AND ORDER

This action came on for hearing before the Court, and the issues having been heard upon stipulation and a decision of the Court having been rendered on April 29, 1969.

It is ORDERED And ADJUDGED

1. That item 11 of Section III of the plaintiffs' tariff annexed to the petition herein is valid and enforceable ex-

cept to the extent that it assesses strike storage against vessels for cargo on which free time has expired when the strike begins.

2. Each of the defendants listed below is ordered to pay the corresponding plaintiff the principal sum shown plus the interest indicated:

Defendant	Plaintiff	Principal Amount	Interest from date of filing Petition	Total
J. F. Moran Co.	Port Terminals, Inc.	$1158.63	$256.94	$1415.57
United States Lines	New York Central System	2985.20	661.94	3647.14
Furness, Withy & Co.	Mystic Terminal Co.	8765.20	1943.67	10708.87
Moran Shipping Agencies, Inc.	Mystic Terminal Co.	860.89	190.89	1051.78
American Export Lines, Inc.	Mystic Terminal Co.	404.23	89.63	493.86
Boston Shipping Corp.	Mystic Terminal Co.	328.28	72.80	401.08

C. E. WYZANSKI, JR.

Entered: May 2, 1969
[Filed

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

(Title omitted in printing)

[Filed

NOTICE OF APPEAL

Notice is hereby given that Rederiaktiebolaget Transatlantic, Defendant-Intervener above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on the 2nd day of May, 1969.

REDERIAKTIEBOLAGET TRANSATLANTIC
By its attorney
/s/ STEPHEN MOULTON
Stephen Moulton
MOULTON, LOONEY, MAZZONE, FALK
& MARKHAM
15 Broad Street
Boston, Massachusetts 02109

United States Court of Appeals for the First Circuit.

No. 7368.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,
PLAINTIFFS, APPELLEES,
v.
BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS,
REDERIAKTIEBOLAGET TRANSATLANTIC,
DEFENDANT-INTERVENOR, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*,
and MCENTEE, *Circuit Judge*.

January 8, 1970.

ALDRICH, *Chief Judge*. The members of the Port of Boston Marine Terminal Association (Terminals), operate pursuant to Federal Maritime Commission Agreement No. 8785, a conference arrangement approved by the Commission under section 15 of the Shipping Act. 46 U.S.C. § 814. Approval permits uniform rates for all "services,

* By designation.

facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water electricity." The tariffs so established were first filed with the Commission in 1962. Wharf demurrage was therein defined as a storage charge "levied against cargo remaining on a pier or wharf after the expiration of free time." On imported cargo "free time" was the first five days after unloading, an arbitrary period to permit consignees sufficient access to the cargo to satisfy the carrier's obligation to make delivery. If delivery was not taken within the free time, the charge, by accruing against the cargo, became the consignee's obligation.

If access to cargo was prevented by a strike, the demurrage rate was substantially reduced, but it remained as a charge against unloaded cargo. This led to complaints by consignees. By December 1964, through a series of amendments, Terminals changed the tariff to provide that if the consignee's access was prevented by a strike of longshoremen or other agents of the ship, as distinguished from employees of Terminals, the reduced demurrage would be called "strike storage" and charged to the vessel instead of to the cargo. This charge was expressed in broad terms, and resulted in shifting the obligation to the vessel even if the strike did not commence until after the expiration of the free time. The new tariff purported to be immediately effective, and hence was imposed without approval by the Commission.

Appellant Rederiaktiebolaget Transatlantic (Swedish) is a common carrier serving the Port of Boston. On January 8, 9, and 10, 1965, its vessel MATTAWUNGA unloaded cargo in Boston at Mystic Terminals. On January 11 there was a general longshoremen's strike. Longshoremen are employees of the stevedoring concerns which serve all vessels. Tally clerks, who are also agents of the vessel, correspondingly struck. Accordingly there could be no

completed delivery of cargo to consignees who had not called before January 11. Non-delivery was additionally assured because transportation employees serving consignees observe picket lines. Under the 1964 amendments Terminals charged the resultant demurrage to the various vessels. MATTAWUNGA'S bill was $8,154. Swedish denied the obligation. Other carriers similarly situated took the same position.

Thereafter Terminals brought an action in the Massachusetts Superior Court for declaratory relief and for payment against Boston Shipping Association (Shipping), representing various vessel owners and agents. Shipping removed the case to the district court. At the suggestion of Terminals the district court ruled that the Commission had primary jurisdiction and entered a stay permitting Shipping to proceed there. Shipping did so, and lost. *Boston Shipping Ass'n, Inc.* v. *Port of Boston Marine Terminal Ass'n*, 1967, 10 F.M.C. 409, hereinafter *Boston Shipping*. It then appealed to the D.C. Court of Appeals, but the appeal was dismissed for late filing. Subsequently Swedish, which was not a member of Shipping, sought to appear before the Commission and to petition for reconsideration.[1] The petition was refused docketing because of lateness. Swedish then sought to intervene as a defendant in the district court proceedings, and that motion was allowed. Upon intervening, Swedish filed an answer raising defenses on the merits. On stipulations of fact the court, without jury, found against all defendants, including Swedish. Swedish, only, appeals.

The first question must concern the jurisdiction of the district court. There is no diversity jurisdiction as to

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[1] Swedish asserted a conflict with *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 1968, 390 U.S. 261, hereinafter *VW*, a case which postdated the *Boston Shipping* decision.

Swedish, for lack of the jurisdictional amount, 28 U.S.C. § 1332. We see no basis for aggregation of the claims against the several defendants. *Cf. Snyder* v. *Harris*, 1969, 394 U.S. 332; *Pinel* v. *Pinel*, 1916, 240 U.S. 594, 596; *Troy Bank* v. *G. A. Whitehead & Co.*, 1911, 222 U.S. 39, 40-41. If this were a suit under a tariff, jurisdiction would automatically attach under 28 U.S.C. § 1337, where the amount involved is of no consequence. *Peyton* v. *Railway Express Agency, Inc.*, 1942, 316 U.S. 350; *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 1926, 271 U.S. 259, 261. Terminals' tariff was not, however, a tariff in the sense of being within 46 U.S.C. § 817, and was filed with the Commission only as a condition imposed by the prior approval of the conference agreement.[2] We nevertheless find a sufficient federal issue. While it is commonly held that the question must appear on the face of the complaint, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 1950, 339 U.S. 667; *Louisville & Nashville R.R.* v. *Mottley*, 1908, 211 U.S. 149, the necessity for construing a federal statute may appear by inference. *Cf. Peyton* v. *Railway Express Agency, Inc., supra.* It is true that the complaint did not allege that the change in the agreement had not been approved by the Commission, but neither did it allege approval. Hence we conclude, albeit with some hesitation, that the necessity of approval was raised, and that it sufficiently appeared that a question of construction of the Shipping Act was presented. This is enough to satisfy section 1337.

We turn to this question forthwith, as it constitutes Swedish's most significant defense. Section 15 requires that "modifications," as well as the original agreement,

[2] General filing requirements for marine terminal tariffs were added by the Commission's General Order 15, 46 C.F.R. §§ 533.1 *et seq.*, which became effective on October 5, 1965, and hence does not apply here.

receive the prior approval of the Commission. In *Boston Shipping* the Commission, without any discussion of the broad language of the act, held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring section 15 filing and approval. In the light of the strictures expressed in *VW, supra*, n. 1, this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in *VW* pointed to the "expansive language" of section 15,[8] and the Commission's "extremely narrow view," and specifically rejected the binding effect of the Commission's administrative construction. 390 U.S. 261, 272-73. Then, referring to the statute's "literal provisions," the Court spoke of possible exceptions only in terms of a "*de minimis* or routine character," and stated that even these must be defined by "appropriate administrative proceedings." 390 U.S. 261, 276.

Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found "*de minimis* or routine." Administrative standards cannot be established ex post facto. *Cf. NLRB* v. *Wyman-Gordon Co.*, 1969, 394 U.S. 759; 5 U.S.C. § 553.

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[8] The statute requires the filing of "every agreement . . . or modification . . . thereof . . . fixing or regulating transportation rates or fares . . . ." It then provides that the Commission shall approve or disapprove, upon terms stated, and that "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, cancellation . . . ." *See also* n. 4, *infra*.

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We may add, for good measure, that a change in incidence, as distinguished from a change in rate,[4] seems to us anything but routine. Even less routine is an unjustifiable change. The Commission expressly found this one "unjust and unreasonable" to the extent that demurrage was to be charged to the vessel even if the strike did not commence until after the expiration of free time, when the vessel's obligation to make the goods available had been fully performed. 10 F.M.C. at 417-18. It would peculiarly violate section 15's "expansive language" to hold that an unreasonable modification could be rewritten nunc pro tunc and saved in part.[5]

We need consider only one other matter, the question of the binding effect of the *Boston Shipping* decision even though erroneous. We are not concerned with the parties to the proceeding, as they did not join in the present appeal. Nor is the question whether the decision was an appropriate approval—to the extent that it was an approval—of demurrage charges incurred after its date. We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. *See Columbia Broadcasting System, Inc.* v. *United States*, 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise § 18.05. Any other conclusion would destroy the statutory requirement.

Reversed; judgment for the intervening defendant.

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[4] The Commission's prior view, that all rate changes under such an agreement are without section 15, *Empire State Highway Transp. Ass'n, Inc.* v. *American Export Lines, Inc.*, 1959, 5 F.M.B. 565, *affirmed, Empire State Highway Transp. Ass'n, Inc.* v. *Federal Maritime Board*, D.C. Cir., 1961, 291 F.2d 336, *cert. denied* 368 U.S. 931, fell with the overruling of the Commission in *VW, supra*. Some changes in rates and charges are now expressly allowable without approval under the 1961 amendment of section 15. This portion is quoted in *VW, supra*, 390 U.S. at 269-70, n. 16. The Commission did not rely upon that provision, nor do appellees herein.

[5] *See* n. 3, *supra*.

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United States Court of Appeals for the First Circuit.

No. 7368.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,
PLAINTIFFS, APPELLEES,

v.

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
DEFENDANTS.

REDERIAKTIEBOLAGET TRANSATLANTIC,
DEFENDANT-INTERVENOR, APPELLANT.

JUDGMENT

Entered January 8, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded with directions to enter judgment for the intervening defendant. Costs on appeal in favor of appellant and against Port of Boston Marine Terminal Association et al., appellees.

By the Court:
ROGER A. STINCHFIELD
Clerk.

By /s/ Dana H. Gallup
Chief Deputy Clerk.

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

April 21, 1970

John M. Reed, Esq.
Withington, Cross, Park & Groden
73 Tremont Street
Boston, Massachusetts 02108

RE: PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL. v. REDERIAKTIEBOLAGET TRANSATLANTIC, No. 1251, October Term, 1969

Dear Mr. Reed:

Confirming our telegram of yesterday the Court took the following action in the above-entitled case:

"The petition for a writ of certiorari is granted and the case is placed on the summary calendar."

I enclose a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,
JOHN F. DAVIS, Clerk
By Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Enclosures

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Supreme Court of the United States

No. 1251 ---- , *October Term, 19* 69

Port of Boston Marine Terminal
Association, et al.,

Petitioners,

v.

Rederiaktiebolaget Transatlantic

ORDER ALLOWING CERTIORARI. Filed April 20 ------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First ---------- . Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.